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Memorandum

EXCISE

File w/ my Liberty Claim File (442)

TO : L - Mr. Salans

DATE: October 9, 1967

FROM : L/C - Ernest L. Kerley

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SUBJECT: U.S.S. Liberty claims - calculation of amount of compensation to be claimed in death cases

This memorandum describes the process we propose to follow in calculating the amount of compensation to be claimed in the U.S.S. Liberty death cases. It also discusses certain problems which arise in connection with the calculation of compensation to be claimed.

Use of formula

The simplest procedure which could be followed in determining the amount of compensation to be paid in death cases would be to use a fixed amount, or a series of fixed amounts in all cases. For instance, we could claim $50,000 for the wife and $20,000 for each child, etc. Such a procedure would have little to recommend it. The U.S.S. Liberty deaths have resulted in a different degree of pecuniary loss to the various dependents and it would be unfair not to recognize that difference. Moreover, the precedents in international adjudication support the use of varying amounts of compensation intended to approximate the amount of pecuniary loss suffered in individual cases.

Any formula for calculating the amount of pecuniary loss suffered by each dependent must be operable on the basis of the information available to the Department and must be compatible with the necessity of reasonable expedition in the preparation of the claims. This is a difficult requirement. For example, in the case of Meehan v. Central Railroad Company of New Jersey, 181 F. Supp. 594 (1960) the opinion of the court regarding the calculation of loss in a death

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case includes 17 pages of precise calculations. The information on which these calculations were based was obtained in 9 days of litigation. We obviously do not have time for such involved calculations, and we do not have, and could not get, the wealth of detailed information about each claimant on which to base such calculations. There is no injustice in our inability to make such elaborate calculations. It seems unlikely that the average jury indulges in such complexity.

While we propose to use a formula in calculating compensation to be claimed, we would claim a single total amount on each claim from the Israelis without indicating the process of calculation. In the event that subsequent negotiations with the Israelis required us to justify and explain the amount claimed, we would be able to explain the formula and how it was applied. We would also be prepared to explain the formula to individual claimants and members of Congress who might inquire on their behalf. Since we will be claiming different amounts in the various death claims, we would need to be able to explain that the amount claimed had been determined by application of the same formula in all cases.

Evaluation of elements of the formula

The elements of an international claim for compensation arising out of wrongful death are clear: loss of support, the value of loss of special services, and emotional anguish arising from the death. Adequate domestic or international precedent are not available, however, as to the amount of compensation to be allowed for each element. International tribunals regularly state the awards as a total amount, without indicating the amounts allowed for each element. On the domestic level, the amount allowed for wrongful death is usually fixed by the jury and again stated as a total figure. Cases such as the Meehan case, where a detailed statement of the amount allowed for each element of the claim is indicated in the opinion, are rare.

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It is recognized that no absolute value can be used as a basis of calculation on any of the elements of a claim for compensation in death cases. All three elements involve unprovable assumptions with regard to future events, and subjective evaluations. In the words of the Mixed Claims Commission:

> "Use of life-expectancy and present-value tables.--Ordinarily the facts to which must be applied the rules of law in measuring damages in death cases lie largely in the future. It results that, absolute knowledge being impossible, the law of probabilities and of averages must be resorted to in estimating damages, and these preclude the possibility of making any precise computations or mathematical calculations. As an aid--but solely as an aid--in estimating damages in this class of cases, the Commission will consider the standard life-expectancy and present-value tables. These will be used not as absolute guides but in connection with other evidence. ...Neither will we lose sight of the fact that life tables are based on statistics of the length of life of individuals, not upon duration of their physical or mental capacity or of their earning powers. In using such tables it will be borne in mind that the present value of the probable earnings of deceased depends on many more unknowable contingencies than does the present value of a life annuity or dower." Mixed Claims Commission (United States/Germany), Consolidated Edition of Decisions and Opinions, 1925-1926 at 23-24 (1927).

While no figure for any of the elements of the claim for compensation can be absolutely defended as valid, the best that can be done is that each figure used should be reasonable and that the application of all the formula should lead to an equitable result. These are all that would be accomplished by an international tribunal or by a jury.

Claims on behalf of parents

In most of the cases the claims for compensation on behalf of the parents will be relatively small since the deceased persons appear generally not to have been giving any support to their parents. The question arises, however, whether any claim at all may be made on behalf of the parents in cases where the deceased persons were married. Under the wrongful death statutes of most states the wife and child have the exclusive right to claim and the parents may not claim where the deceased was married. 16 Am. Juris, Death 76-77 (1938). These statutes are, of course, not binding in international practice, and the international practice has been to allow parents as well as the wife and child to claim in cases arising out of wrongful death. We accordingly propose to present a claim for the parents as well as the wife and children while recognizing, however, that claims on behalf of parents might encounter some resistance in our negotiations with the Israelis.

Computation formula

We propose to calculate the compensation we will claim on the attached forms. Some explanatory comments are necessary.

A. Loss of Support

One element of the formula for ascertaining the dollar value of losses sustained by dependents of the decease is the loss of contributions the decedent would have made to their support had he not been killed. We will deal first with support of the wife and family, in the case of married decedents. It is obvious that the decedent could not contribute more than the total of his net earnings less family and personal expenses necessary to create such income. (Where there is also an allowance for support of the parents, that will also have to be deducted.)

In ascertaining the amount of contributions to the wife and children, courts in the United States and various international arbitral tribunals have taken the following factors into consideration:[1] (1) the age of the decedent at the time of death;

[1] See L/C memorandum of July 10, 1967

(2) the number of years decedent would have been employed; (3) the actual yearly salary at the time of death; (4) the average yearly salary projected over the years the decedent would have been employed; (5) the expenses decedent would have incurred over the years, such as, net general family expenses, income taxes and personal expenses, and (6) the present worth of contributions.

In the absence of an extensive investigation, relatively little evidence and information will be available to conclusively establish many of the foregoing factors. Accordingly, it will be necessary to make certain assumptions with a view to arriving at the amount of future contributions. In the circumstances, we will assume, in the absence of evidence to the contrary, the following in determining the dollar value of the contributions:

(1) The decedent would have been employed until the customary age of 65.

(2) The salary of the decedent during the years 30 to 39 would have been 130% of what it was during the years 20 to 29; during the years 40 to 49 it would have been 120% of what it was during the years 30 to 39; during the years 50 to 65 it would have been 110% of what it was during the years 40 to 49.

(3) That a percentage of the projected average yearly salary would be deducted to allow for family expenses attributable to the decedent, taxes and personal expenses of the decedent. This percentage would be calculated by assuming that each member of the family would share equally in the average annual salary for the number of years described below. A similar assumption appears to have been insisted upon by the Second Circuit in O'Connor v. U.S., 251 F 2d 939 (1958); 269 F 2d 578 (1959). Both the husband and wife would share in the annual salary as long as it was earned--that is, until the husband reached 65. A child would share in the annual salary until the age of 18 on the ground that he would be self-sufficient at that age. Thus, the percentage of the annual salary to be deducted to allow for family expenses attributable to the decedent, taxes and his personal expenses would be calculated by dividing the remaining work years of the decedent by (a) twice the remaining work years of the decedent plus (b) the total remaining years of each of the children until the age of 18. This formula admittedly assumes that the income taxes would be paid out of the decedent's share of the annual income, and this assumption is defensible. In cases where the number of dependents is large, and the decedent's share of annual income is consequently small, the income tax paid would be small or non-existent.

(4) That a 3-1/2% rate of interest compounded annually be used with a factor corresponding to the number of years involved.

Applying these assumptions, we would compute the number of work years remaining to the decedent, and his average yearly salary during that period. Deducting the appropriate percentage of the average yearly salary for net family expenses, taxes, etc., we would arrive at the projected lifetime contribution which the deceased would have made to his wife and family. This would be discounted to arrive at the amount of the claim for this element.

To claim for loss of support of the parents presents a more difficult problem. Financial support is not an automatic consequence of the parent-child relationship. Parents seldom receive support from a child unless they are in financial need. Even when the parents are needy, the son may be unable to contribute to their support because of his primary obligation to support his wife and children. We accordingly propose, in the absence of specific evidence establishing that the decedent would have begun supporting his parents at some future date, to claim on behalf of the parents for loss of support only in those cases where the decedent was supporting his parents at the time of his death. It is admittedly possible that the parents might have become needy at a later date, for instance when the father retired. It is equally possible, however, that the deceased, even if unmarried at the time of his death, would have married prior to the time his parents' need arose. We do not have the information to resolve such imponderables.

In cases where we claim support for the parents, we would assume that the deceased would not have reduced the amount of support when one of the parents died. Accordingly, we would compute the amount of support the deceased was providing at the time of his death, through the life expectancy of which ever parent had the greater life expectancy, discounting the total to arrive at the amount of the claim.

B. Loss of Special Services

While no compensation is allowed for mere loss of companionship, any special services the deceased would have performed for the claimant may be compensated for. These are often difficult to define, and still more difficult to evaluate. For the widow, aid and assistance would certainly have been provided by the deceased, and a valuation of $500 per year seems reasonible for such services. This figure could be increased in cases where the evidence shows unique services not normally present.

In the case of the deceased's children, the principal special services would have been guidance, counselling and supervision during their growth. The awards for this loss vary in amount. In the Lusitania cases, the Mixed Claims Commission allowed $5000 in the Dora Burke claim and $20,000 in the Thomas B. King, Jr. claim for the loss of their father. Both of these awards, however, included loss of support in addition to loss of care and supervision. 3 Whiteman, Damages 692. Only loss of "care, training and education" was included in the award of $5000 per child for the loss of the mother in the Hammond claim. Id at 692-93. In the Bilicke claim, the children were awarded $30,000 each for "being deprived of the care and supervision of a father of unusually strong character and judgment." Id at 693. It is difficult to find a guiding principle in these cases.

Courts in the United States have allowed as high a figure as $1420 per year per child until the age of 18. This was under special circumstances, where the deceased father, a writer, was shown to have been specially gifted as a guide and counsellor of his children. Rogow v. United States, 173 F. Supp. 547 (1959). It seems difficult to justify so high a figure in our claims, especially since the deceased personnel, during the period they were in the Navy, would have been away from their families a fair proportion of the time. We propose to use the figure of $500 per year per child until the date the child would have reached 18 years.

Special services performed by mature sons for their parents are usually minimal, in the absence of special circumstances such as the infirmity of the father. The personnel aboard the Liberty who were not married were of marriagable age, and foreseeably would have married after their return from duty. We accordingly do not propose to claim for loss of special services on behalf of the parents, except in the case of special circumstances, which are specifically supported by the evidence.

Since the special services would have been performed over a period of time, their present value is discounted over the time they would have been provided. In the case of services to the wife, the period is the life expectancy of the deceased or the wife, whichever is less. In the case of the children, the period is the number of years until they reach 18.

C. Shock and Mental Anguish

The shock and mental anguish resulting from death is difficult to define in pecuniary terms. The Mixed Claims Commission (United States/Germany) allowed $10,000 for shock and mental anguish to the parents of Richard R. Freeman, who was killed in the sinking of the Lusitania. Freeman, the Commission noted, was "the last in the male line of an old and honored family" and was, moreover, a graduate of Harvard. 3 Whiteman, Damages 778. In the Gretton case the same commission allowed $5,000 for grief and shock to the mother of a nine-year old daughter, who was also lost on the Lusitania. Id. at 779. The General Claims Commission (United States/Mexico) allowed $7,000 to the brother and aunt of Edward Stephens, who had been shot by a Mexican soldier. Some, but not all, of that sum seems to have been for grief. Id. at 779-80. At the same time, many of the total awards listed in Whiteman for "Claims of Widows for Death of Husband" are for less than $10,000, and presumably much of these amounts were primarily for loss of support. Id. at 796. In the one claim listed therein which specifically involved shock and grief, the Denham claim, the award -- under admittedly special circumstances -- was for only $2,500.

It seems doubtful that any clear legal precedents can be found for fixing the amount of compensation for shock and mental anguish. Moreover, the cases cited above are old cases; it is likely the awards would be greater today. We propose $25,000 for the wife, and $10,000 for each minor child over five years of age. It seems doubtful that a child under five years could sufficiently comprehend the event to suffer shock and grief. We propose to claim $10,000 for each parent, whether the deceased was married or not. The parent-child relationship is severed whether the deceased was the father or the son of the claimant, so it seems reasonable to evaluate the loss of the claimant at the same figure, whether the claimant is a parent or a child.

Attached are work forms on which each of the elements of a death claim would be computed. Annexed also is an example of how three typical claims would work out.

Attachments:
1. Work forms A thru D
2. Annex - Typical Application of Formula

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FORM A - Loss of support of wife and minor children

I	Age at death	_____
II	Work years remaining[1]	_____
III	Salary per year at death	$ _____
IV	Average yearly salary based on a projection of _____ work years[2]	$ _____
V	Expenses:[3]	$ _____
VI	Yearly projected average of future contributions	$ _____
VII	Lifetime projected contributions[4]	$ _____
VIII	Discounted yearly projected contributions based upon _____ work years at 3-1/2% compounded annually with a factor of _____[5]	$ _____

1. It is assumed that the decedent would have worked to the customary retirement age of 65.

2. It is estimated that the present salary will increase by 20% between the ages of 20 and 30, and 10% for each subsequent 10-year period to age 60.

3. Estimated at 50% of projected average salary and takes into consideration general family expenses (net), income tax and decedent's personal expenses.

4. Number of work years multiplied by the yearly projected average.

5. An interest rate of 3-1/2% is selected because such rate is employed by the Internal Revenue Service and insurance companies.

FORM B - Loss of support of parents

I	Remaining life years of mother Remaining life years of father	_____ _____
II	Amount of support per year deceased was providing at time of death	$_____
III	Lifetime projected contributions[1]	$_____
IV	Discounted lifetime projected contributions at 3-1/2% compounded annually	$_____

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[1] Number of remaining life years of father or mother, whichever is greater, times annual support.

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FORM C - Loss of special services by wife and children

I Children's loss of special services:

First Name	Age	Years to 18	x$500	Projected total	Discounted at 3-1/2%
				$	$

II Wife's loss of special services:

A. Remaining life years of deceased or wife, whichever is less _____

B. $5,000 discounted at 3-1/2% $_____

III Total ..... $_____

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FORM D - Emotional anguish

I Wife and children

Wife $10,000

Minor children over 5 years

First name	Age	x$2,500	
_____	_____		$_____
_____	_____		$_____
_____	_____		$_____
_____	_____		$_____
_____	_____		$_____

II Parents

Living mother [ ] x $2,500 $_____

Living father [ ] x $2,500 $_____

ANNEX

Typical application of formula.

[redacted]

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Age 38. Annual salary at death $12,362. Married, five children aged 7-1/2 to 14-1/2. We would claim:

A.	For wife and children		
	1. Loss of support	$141,152	
	2. Loss of special services	25,530	
	3. Emotional anguish	22,500	$139,232
B.	For parents - emotional anguish	5,000	

[redacted]

E B-6

Age 23. Annual salary at death $4,015. Married, two children aged 1 year and 2 months. We would claim:

A.	For wife and children		
	1. Loss of support	$ 67,646	
	2. Loss of special services	15,207	
	3. Emotional anguish	10,000	$ 91,353
B.	For parents - emotional anguish	5,000	

[redacted]

E B-6
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Age 20. Annual salary at death $2,755. Unmarried. Contributed about $500 per year to support of parents, aged 69 and 46 years. We would claim for the parents:

1.	Loss of support	$ 4,874	
2.	Special services	--	
3.	Emotional shock	5,000	$ 9,874

[redacted]